

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIAM WESTER and AMANDA F. WESTER, husband and wife,)
Plaintiffs,)
v.)
HOME SAVINGS MORTGAGE; MARQUIS TITLE; RECONTRUST COMPANY NA; COUNTRYWIDE HOME LOANS, INC; FIRST AMERICAN TITLE; KAREN MERKEL; and DOES 1-25 Corporations; DOES and ROES 1-25 Individuals, Partnerships, or anyone claiming any interest to the property described in the action,)
Defendants.)

3:11-cv-486-RCJ-VPC

ORDER

Defendants Countrywide Home Loans, Inc. ("Countrywide") and Recontrust Company, N.A. ("Recontrust") (collectively "Defendants") filed a motion to dismiss for failure to state a claim under Rule 12(b)(6) and to expunge the lis pendens placed on the property. (Mot. to Dismiss (#9)). Because the foreclosure process was proper, Defendants' motion to dismiss and expunge lis pendens (#9) is granted.

BACKGROUND¹

¹ Defendants have requested judicial notice to be taken of attached copies of relevant publicly recorded documents. (See Mot. to Dismiss (#9) at 3 n.2). The Court will take judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (the court may take judicial notice of the records of state

1 Plaintiffs William and Amanda Wester (“Plaintiffs”) are the owners of real property
 2 located at 853 Moth Circle, Reno, Nevada 89506 (the “Property”). (Compl. (#1-1) at 2). On
 3 September 5, 2006, Plaintiffs obtained a \$164,450.00 loan as a cash-out refinance from Home
 4 Savings Mortgage, which was secured with a deed of trust encumbering the Property (“Deed
 5 of Trust”). (Deed of Trust (#9-8) at 1-2). Plaintiffs received \$43,677.59 in cash as a result of
 6 this transaction. (Mot. to Dismiss (#9) at 3). The Deed of Trust listed Home Savings Mortgage
 7 as the lender, Marquis Title as the trustee, and Mortgage Electronic Registration Systems, Inc.
 8 (“MERS”) as the nominee and beneficiary. (Deed of Trust (#9-8) at 2). Plaintiffs agreed in the
 9 Deed of Trust that MERS, as nominee, had the right to exercise legal title over the interests
 10 granted under the Deed of Trust in place of the lender, including the power to foreclose and
 11 sell the Property. (*Id.* at 3).

12 Plaintiffs subsequently defaulted on the loan secured by the Deed of Trust. (Mot. to
 13 Dismiss (#9) at 3). Recontrust executed a notice of default and election to sell on June 5,
 14 2008, but later rescinded this notice of default on July 3, 2008. (Notice of Default (#9-10) at
 15 1-2; Compl. (#1-1) at 4-5). On September 11, 2008, MERS substituted Recontrust as trustee
 16 in place of Marquis Title. (Substitution of Trustee (#9-9) at 1). Recontrust then recorded a
 17 notice of default and election to sell on September 17, 2008, and a notice of trustee’s sale on
 18 May 20, 2009. (Compl. (#1-1) at 6). MERS assigned the Deed of Trust to BAC Home Loans
 19 Servicing, LP (“BAC”), formerly known as Countrywide Home Loans Servicing LP on February
 20 25, 2011. (Assignment (#9-11) at 1). The same day, BAC executed a substitution of trustee,
 21 again replacing Marquis Title with Recontrust, which was recorded on March 1, 2011.
 22 (Substitution of Trustee (#9-12) at 1). Recontrust then recorded notices of trustee’s sales on
 23 January 20, 2011; February 25, 2011; March 1, 2011; and July 12, 2011. (Compl. (#1-1) at
 24 6-7; Mot. to Dismiss (#9) at 4; Notice of Trustee’s Sale (#9-13) at 1). As of August 26, 2011,
 25 the Property had not yet been sold. (Mot. to Dismiss (#9) at 4).

26 On May 24, 2011, Plaintiffs filed their complaint in state court (which was later removed
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28 agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 to this Court), alleging nine causes of action, including: (1) debt collection violations; (2) unfair
 2 and deceptive trade practices; (3) unfair lending practices; (4) violation of the covenant of good
 3 faith and fair dealing; (5) violation of NRS § 107.080; (6) quiet title; (7) fraud in the inducement
 4 and through omission; (8) slander of title; and (9) abuse of process. (Compl. (#1-1) at 25-49).
 5 The day after this complaint was filed, Plaintiffs recorded a lis pendens on the Property. (Lis
 6 Pendens (#9-14)).

7 Defendants moved to dismiss the complaint for failure to state a claim under Federal
 8 Rule of Civil Procedure 12(b)(6) and to expunge the lis pendens on August 26, 2011. (Mot. to
 9 Dismiss (#9)).

10 **LEGAL STANDARD**

11 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a
 12 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th
 13 Cir. 2001). “[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant
 14 is entitled to offer evidence to support the claims.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d
 15 246, 249 (9th Cir. 1997) (citations omitted).

16 To avoid a Rule 12(b)(6) dismissal, a complaint must plead “enough facts to state a
 17 claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
 18 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim
 19 is plausible on its face “when the plaintiff pleads factual content that allows the court to draw
 20 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.
 21 Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Although “detailed factual allegations” are
 22 not required, the factual allegations “must be enough to raise a right to relief above the
 23 speculative level.” *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be
 24 accepted as true and all reasonable inferences that may be drawn from the allegations must
 25 be construed in the light most favorable to the nonmoving party. *Broam v. Bogan*, 320 F.3d
 26 1023, 1028 (9th Cir. 2003).

27 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 28 leave to amend. The court should freely give leave to amend when there is no “undue delay,

1 bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing
 2 party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*,
 3 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave to amend is only
 4 denied when it is clear that the deficiencies of the complaint cannot be cured by amendment.
 5 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

6 DISCUSSION

7 Defendants have filed a motion to dismiss all nine causes of action against them for
 8 failure to state a claim. (Mot. to Dismiss (#9)). As Plaintiffs have failed to state a claim on all
 9 of their causes of action, Defendants' motion to dismiss is granted.

10 In Plaintiffs' first cause of action for debt collection violations under NRS § 649.370,
 11 Plaintiffs have failed to state a claim because Defendants are not debt collectors as required
 12 by the statute. NRS § 649.370 states that a violation of the federal Fair Debt Collection
 13 Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 et seq., along with all regulations adopted under
 14 this Act is a violation of Nevada law. For a defendant to be liable for a violation of the FDCPA,
 15 the defendant must be classified as a "debt collector" within the meaning of the Act. *Heintz*
 16 *v. Jenkins*, 514 U.S. 291, 294 (1995); *McCurdy v. Wells Fargo Bank, N.A.*, 2010 WL 4102943,
 17 at *3 (D. Nev. 2010). A "debt collector" is defined by the FDCPA as a person "who regularly
 18 collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed
 19 or due another." 15 U.S.C. § 1692a(6). Foreclosure pursuant to a deed of trust does not
 20 constitute debt collection under the FDCPA. *Camacho-Villa v. Great W. Home Loans*, 2011
 21 WL 1103681, at *4 (D. Nev. 2011). Additionally, "the FDCPA's definition of 'debt collector'
 22 does not 'include the consumer's creditors, a mortgage servicing company, or any assignee
 23 of the debt, so long as the debt was not in default at the time it was assigned.' " *Id.* (quoting
 24 *Croce v. Trinity Mortg. Assurance Corp.*, 2009 WL 3172119, at *2 (D. Nev. 2009)). As
 25 Defendants here are foreclosing on the Property pursuant to a deed of trust, they do not
 26 qualify as "debt collectors" within the meaning of the FDCPA, and consequently neither the
 27 FDCPA nor NRS § 649.370 apply.

28 Plaintiffs' second cause of action alleging unfair and deceptive trade practices in

1 violation of NRS § 598.0923 is also dismissed for failure to state a claim. Under the statute,
2 a person engages in a deceptive trade practice when he or she knowingly conducts business
3 without all required state, county or city licenses. NEV. REV. STAT. § 598.0923(1). The statute
4 however explicitly states that the following activities do not constitute doing business in the
5 State of Nevada: (1) maintaining, defending or settling any proceeding; (2) creating or
6 acquiring indebtedness, mortgages, and security interests in real or personal property; and (3)
7 securing or collecting debts or enforcing mortgages and security interests in property securing
8 the debts. NEV. REV. STAT. 80.015(1)(a), (g)-(h). Because Defendants in this mortgage case
9 are not considered to have been doing business in Nevada, NRS § 598.0923 does not apply
10 and consequently this cause of action is dismissed without leave to amend.

11 The Court additionally dismisses Plaintiffs' third cause of action for unfair lending
12 practices under NRS § 598D.100 because the statute of limitations has run on this claim.
13 Plaintiffs allege Defendants engaged in unfair lending practices by luring Plaintiffs into
14 obtaining the loans based solely on the future equity of the home in violation of NRS §
15 598D.100. (Compl. (#1-1) at 28-30). An action "upon a statute for a penalty or forfeiture" has
16 a two-year statute of limitations, unless the statute provides otherwise. NEV. REV. STAT. §
17 11.190(4)(b). The plain language of the statute indicates that it is a statute for a penalty and
18 does not contain its own limitations period, and consequently the statute of limitations period
19 on this claim is two years. See NEV. REV. STAT § 598D.110. As the loan was extended in
20 2006 and Plaintiffs did not file their complaint until 2011, the statute of limitations has run on
21 this claim.

22 Plaintiffs have also failed to state a claim in their fourth cause of action for violation of
23 the covenant of good faith and fair dealing. Nevada law holds that "[e]very contract imposes
24 upon each party a duty of good faith and fair dealing in its performance and its enforcement."
25 *A.C. Shaw Constr. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting RESTATEMENT
26 (SECOND) OF CONTRACTS § 205). To succeed on a cause of action for breach of the covenant
27 of good faith and fair dealing, a plaintiff must show: (1) the plaintiff and defendant were parties
28 to an agreement; (2) the defendant owed a duty of good faith to the plaintiff; (3) the defendant

1 breached that duty by performing in a manner that was unfaithful to the purpose of the
2 contract; and (4) the plaintiff's justified expectations were denied. *Perry v. Jordan*, 900 P.2d
3 335, 338 (Nev. 1995).

4 Defendants first allegedly violated the covenant of good faith and fair dealing by luring
5 Plaintiffs into the initial loan by wrongfully declaring he qualified for the loan. (Compl. (#1-1)
6 at 30). Yet to be actionable, the breach of the covenant must have occurred *after* the
7 formation of the contract, not *before*. *Crow v. Home Loan Ctr., Inc.*, 2011 WL 3585466, at *3
8 (D. Nev. 2011). Plaintiffs also contend Defendants violated the covenant of good faith and fair
9 dealing by offering Plaintiffs consideration for loan modifications, falsely telling them the
10 foreclosures would be postponed. (Compl. (#1-1) at 30). Yet Plaintiffs provided no
11 information that confirms the existence of a loan modification agreement or contract between
12 the parties. See *Perry*, 900 P.2d at 338 (requiring the plaintiff to show the existence of a
13 contract to state a claim for breach of the covenant of good faith and fair dealing). Finally,
14 Plaintiffs argue Defendants violated the covenant of good faith and fair dealing by frustrating
15 the legitimate purposes of the mortgage contract. (Compl. (#1-1) at 31). Foreclosing upon
16 a loan where such foreclosure is permissible by law and the loan agreement does not deprive
17 Plaintiffs of any justifiable expectations as they consented to the arrangement.

18 Plaintiffs have failed to state a claim under their fifth cause of action for violations of
19 NRS § 107.080 because the foreclosure was proper. Countrywide and Recontrust had both
20 been properly substituted as the lender and trustee respectively. (Assignment (#9-11);
21 Substitution of Trustee (#9-9)). Although Recontrust filed a notice of default prior to being
22 substituted as trustee, this notice of default was rescinded and was filed again after the proper
23 substitution was made. (Compl. (#1-1) at 4-6). Furthermore, although BAC substituted
24 Recontrust as trustee after the notice of default was filed on May 20, 2009, MERS had already
25 substituted Recontrust as trustee on September 11, 2008, and because MERS was the
26 nominee and given the right to exercise legal title over the interests granted under the Deed
27 of Trust in place of the lender, this earlier substitution was valid. (Deed of Trust (#9-8) at 3).
28 Because Defendants had been properly substituted and Plaintiffs were in default, the

1 foreclosure proceedings were not improper. See *Gomez v. Countrywide Bank, FSB*, 2009 WL
2 3617650, at *2 (D. Nev. 2009) (finding that as long as the note is in default and the foreclosing
3 trustee is either the original trustee or has been substituted by the holder of the note or the
4 holder's nominee, there is no defect in the Nevada foreclosure).

5 The sixth cause of action for quiet title also fails because Plaintiffs are in default and
6 have not alleged they have paid the debt owed. A quiet title action may be brought by a party
7 who claims an adverse interest in the subject property. NEV. REV. STAT. § 40.010. Quiet title
8 actions are equitable in nature and it is generally required that a party that seeks equity must
9 do equity. *Transaero Land & Dev. Co. v. Land Title of Nevada, Inc.*, 842 P.2d 716, 718 (Nev.
10 1992); *MacDonald v. Krause*, 362 P.2d 724, 727 (Nev. 1961). For the plaintiff to do equity,
11 it is generally required that the plaintiff tender the undisputed amount due on the note in order
12 to challenge the validity of the foreclosure sale. *Davila v. BAC Home Loans Servicing, LP*,
13 2011 WL 3159146, at *2 (D. Nev. 2011). Quieting title to the Property would be inequitable
14 here as Plaintiffs have failed to prove any of their other claims in the complaint. Plaintiffs have
15 also defaulted on the loan and have failed to allege they have tendered or are willing to tender
16 the amount owed on the debt.

17 Plaintiffs' seventh cause of action for fraud in the inducement and through omission fails
18 because Plaintiffs have not alleged any fraudulent statements or omissions concerning the
19 terms of the loan and because Plaintiffs have failed to satisfy the strict pleading requirements
20 of Federal Rule of Civil Procedure 9(b). Under Nevada law, a claim of fraud requires the
21 plaintiff to establish each of the following elements: (1) a false representation; (2) knowledge
22 or belief that the representation was false (or knowledge that the defendant's basis for making
23 the representation was insufficient); (3) intent to induce the plaintiff to consent to the contract's
24 formation; (4) justifiable reliance upon the misrepresentation; and (5) damage resulting from
25 such reliance. *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018
26 (Nev. 2004). Pursuant to Rule 9(b), a party alleging fraud "must state with particularity the
27 circumstances constituting fraud or mistake." To satisfy this standard, a plaintiff must plead
28 "an account of the 'time, place, and specific content of the false representations as well as the

1 identities of the parties to the misrepresentations.’ ” *Swartz v. KPMG LLP*, 476 F.3d 756, 764
2 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)).

3 Plaintiffs here have failed to allege any false statements or omissions that were material
4 to the terms of the loan. Plaintiffs only allege that they were not made aware of the inner
5 workings of the mortgage industry, which ultimately had no effect upon the loan agreement.
6 As Plaintiffs have not alleged any false statements or omissions concerning the terms of the
7 loan, they have failed to state a claim for fraud. Additionally, Plaintiffs’ fraud allegations lack
8 the specificity required by Rule 9(b) because Plaintiffs have failed to allege which Defendant
9 committed what alleged fraud, and when and where these fraudulent actions took place.
10 Therefore, the Court dismisses Plaintiffs’ seventh cause of action without leave to amend.

11 The eighth cause of action for slander of title fails because the statements made by
12 Defendants were not untrue. Plaintiffs allege that Defendants slandered their title by recording
13 the notice of default knowing that they were unauthorized to foreclose and knowing the filed
14 document was defective. (Compl. (#1-1) at 46-47). To succeed on a slander of title claim, the
15 plaintiff must show “false and malicious communications, disparaging to one’s title in land, and
16 causing special damage.” *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 478 (Nev.
17 1998) (quoting *Higgins v. Higgins*, 744 P.2d 530, 531 (Nev. 1987)). Plaintiffs here do not deny
18 they have defaulted under the note, and consequently the notice of default is not a false
19 statement disparaging the title to the Property.

20 Plaintiffs have also failed to state a claim on their ninth and final cause of action for
21 abuse of process because Plaintiffs have failed to allege any facts demonstrating that
22 Defendants had an ulterior purpose in foreclosing, and because nonjudicial foreclosures are
23 not considered “process” for the purposes of this tort. To prevail on a claim of abuse of
24 process, the plaintiff must show that the defendant (1) had an ulterior purpose in bringing legal
25 action other than resolving a legal dispute, and (2) used the legal process in a manner that is
26 not proper in the regular conduct of the proceeding. *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*,
27 963 P.2d 465, 478 (Nev. 1998). Yet Plaintiffs have plead no facts that would show the
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1 Defendants had any ulterior motive in bringing the foreclosure action. The record shows that
2 Defendants were legally authorized to foreclose and did so. Additionally, nonjudicial
3 foreclosures are not the type of "process" the tort of abuse of process was meant to address
4 because by its very definition it does not involve judicial action. See *Barlow v. BNC Mortg., Inc.*,
5 2011 WL 3841223, at *4 (D. Nev. 2011). Plaintiffs' ninth cause of action thus lacks merit
6 and is dismissed without leave to amend.

7 Accordingly, the Court grants Defendants' motion to dismiss (#9) the complaint in its
8 entirety without leave to amend. Moreover, the Court *sua sponte* dismisses all claims against
9 the remaining defendants without leave to amend because Plaintiffs fail to state a claim
10 against them.

11 **CONCLUSION**

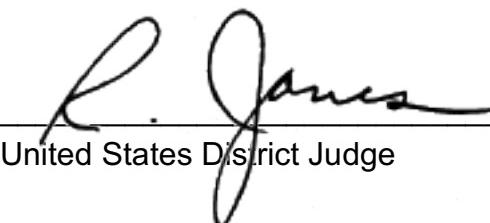
12 For the foregoing reasons, IT IS ORDERED that Defendants' motion to dismiss and
13 expunge lis pendens (#9) is granted.

14 IT IS FURTHER ORDERED that the Court *sua sponte* dismisses the remaining
15 defendants from this case without leave to amend.

17 The Clerk of the Court shall enter judgment accordingly.

18 DATED: This 23rd day of February, 2012.

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United States District Judge